Supreme Court, U.S.
FILED
NOV 21 1997
CLERK

No. 97-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH SETTLES and IOANE TUA,
Petitioners,

vs.

MICHAEL PENILLA, Administrator
of the Estate of Juan Penilla, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

STEVEN N. SKOLNIK
Counsel of Record

2444 Wilshire Boulevard, Suite 414
Santa Monica, California 90403-5812
(310) 829-9843

Attorney for Petitioners
JOSEPH SETTLES and IOANE TUA

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

No. 97-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH SETTLES and IOANE TUA,
Petitioners,

vs.

MICHAEL PENILLA, Administrator
of the Estate of Juan Penilla, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

STEVEN N. SKOLNIK
Counsel of Record

2444 Wilshire Boulevard, Suite 414
Santa Monica, California 90403-5812
(310) 829-9843

Attorney for Petitioners
JOSEPH SETTLES and IOANE TUA

No. 97-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH SETTLES and IOANE TUA,
Petitioners,

v.

MICHAEL PENILLA, Administrator
of the Estate of Juan Penilla, Deceased,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

In support of their Petition for Writ of Certiorari, petitioners JOSEPH SETTLES and IOANE TUA respectfully submit this reply to new points raised in Respondent's opposition brief.

The Petition cites numerous cases from outside the Ninth Circuit showing the lack of accord over a "danger enhancement" exception to *DeShaney* v. *Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). See Pet. for Cert., at 6–9.

Respondent's opposition ignores nearly all those cases. Instead, Respondent cites other cases for the supposed proposition that lower court decisions are in accord.

If anything, Respondent's cases show precisely the opposite.

Respondent relies heavily on *Ross* v. *U.S.*, 910 F.2d 1422 (CA7 1990). As one commentator has noted, though, *Ross* is a highly unexpected judicial development that seems attuned to the *DeShaney* dissent and at odds with the *DeShaney* majority. See 104 HARV. L. REV. 1147, 1150–53 (1991).

Respondent also emphasizes a negative implication he perceives in *Rogers* v. *City of Port Huron*, 833 F.Supp. 1212 (ED Mich. 1993). *Rogers* found no constitutional violation where an inebriated man died after police left him lying unconscious along a roadside. Yet the Third Circuit found virtually identical conduct to violate the Fourteenth Amendment in *Kneipp* v. *Tedder*, 95 F.3d 1199 (CA3 1996).

Which rule is correct?

If judges cannot agree as to what conduct is constitutionally permissible in an emergency situation, how are public rescue workers to know what to do?

It would be detrimental to society for public safety workers to hesitate in a crisis simply because they cannot be certain as to the constitutionality of alternative courses of action.

Citizens' lives are at stake. It is imperative for this Court to provide a definitive answer to the following question: How much latitude do public safety workers have when responding to a crisis before they must account to a federal jury for failing to rescue an endangered citizen?

CONCLUSION

For all of the foregoing reasons, the Petition should be granted.

DATED: November 20, 1997

Respectfully submitted,

STEVEN N. SKOLNIK
Counsel of Record for Petitioners
JOSEPH SETTLES and IOANE TUA